STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 22, 2007
v JOSEPH ALLEN PALMER, Defendant-Appellant.	No. 265289 Wayne Circuit Court LC No. 05-003395-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v MYRON JACKSON, Defendant-Appellant.	No. 265377 Wayne Circuit Court LC No. 05-004843-01

Before: Jansen, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendants Joseph Palmer and Myron Jackson were tried jointly before a single jury. Each defendant was convicted of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant Palmer was also convicted of felon in possession of a firearm, MCL 750.224f. Defendant Palmer was sentenced to concurrent prison terms of 23 to 60 years for the assault conviction, two to five years for the felon in possession conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant Jackson was sentenced to a prison term of 12 to 25 years for the assault conviction, and a consecutive two-year term for the felony-firearm conviction. Each defendant appeals as of right. We affirm.

I. Underlying Facts

This case arises from an acquaintance shooting, from defendants' vehicle to another, in which the victim, Aaron Bartlett, was shot four times in the head when his car was stopped at an

intersection in Detroit. Bartlett testified that he had previously been a friend of defendants for about five years. In 2004, Bartlett and defendant Palmer purchased a car together, and thereafter had several disagreements concerning possession and use of the vehicle. During one disagreement, a physical fight erupted between Bartlett and defendant Palmer, and a separate fight erupted between Bartlett's cousin Marco and defendant Jackson. After the fight, Bartlett took the car and left. Bartlett had no communication with defendants after this incident. He had not seen defendant Jackson; he had seen defendant Palmer, but did not speak with him.

On March 1, 2005, at about 8:30 p.m., Bartlett and Rolland Roach stopped at a party store on Oakland and Clay streets in Detroit. Bartlett and Roach testified that defendant Jackson was also at the store, and Bartlett briefly conversed with him. Roach testified that defendant Jackson asked about Marco. As Bartlett was conversing with defendant Jackson, defendant Palmer got out of the passenger side of a brown or gold minivan and walked toward Bartlett's car. Bartlett and Roach testified that Bartlett asked defendant Palmer if they were going to fight. Defendant Palmer allegedly denied wanting to fight, and said, "I got it." "I'll handle it." Defendants walked back to the minivan, with defendant Jackson getting into the driver's side. Bartlett and Roach left.

At about 10:00 p.m., Bartlett was driving around the area of Oakland and Clay with four friends. Bartlett's girlfriend, Shanara King, was asleep in the front seat, Roach was seated in the rear passenger side, "Brandon" was seated in the rear driver's side, and Devon Lockridge was seated in between Roach and Brandon. Bartlett testified that when he stopped in the left turn lane at a traffic light, the same minivan that he saw defendants in earlier stopped alongside the driver's side of his car. Bartlett and Roach identified defendant Jackson as the driver of the minivan. Roach testified that the minivan was so close to Bartlett's car that Bartlett would not have been able to open his door. Bartlett and Roach testified that defendant Palmer, who was in the front passenger seat, extended his arm out of the window, and fired a gun. Roach stated that defendant Palmer fired about six gunshots. The first shot broke Bartlett's driver's side window. Bartlett was shot four times in the head, and once in the shoulder.

Defendant Palmer did not testify at trial. Defendant Jackson testified, and denied any involvement in the shooting. Defendant Jackson presented two alibi witnesses, who testified that defendant Jackson was at home at the time of the shooting.

II. Docket No. 265289 (Defendant Palmer)

A. Prosecution's Failure to Produce Two Endorsed Witnesses

Defendant Palmer argues that he is entitled to a new trial because the trial court excused the prosecution from producing endorsed, res gestae witnesses King and Lockridge, without conducting a "proper due diligence hearing." We disagree.

King and Lockridge were endorsed on the prosecution's witness list. Both were served with subpoenas to appear for trial, and both failed to appear.[1] On the second day of trial, Thursday, August 18, 2005, the attorneys informed the trial court that Lockridge and King had not appeared. The prosecutor advised the court that both witnesses had been personally served by the police and by a detective from the prosecution's office. Pursuant to the prosecutor's request, the trial court authorized bench warrants for the witnesses.

The trial reconvened on Monday, August 22, 2005, and the prosecution rested. It was then noted that Lockridge and King had not been apprehended. The trial court indicated that it would "proceed without them." Defendant Palmer's attorney argued that although bench warrants were issued, he was unsure of "how vigorously they were looked for [by the police]." Codefendant Jackson's attorney joined in and noted that on the previous trial day, after the warrants were issued, a police sergeant had indicated that he would attempt to apprehend the witnesses, and have them in court on Monday, and thus he questioned "how much diligence did the police officers use." The trial court noted its understanding that King was a prostitute, and thus the police could not simply go to her workplace to find her. The court then indicated:

> We will deal with that maybe a little bit later if you want to show me some law that indicates that we need to get into that, but I do know that the police department did in fact go out and personally serve these witnesses, and the prosecutor represented that their [sic] investigator and the prosecutor's office personally served those witnesses.
>
> I think the law clearly indicates reasonable. So that if somebody is served with a subpoena, that we expect that they will show up to testify. And when they didn't, and I think that is reflective of the fact that both the police and the prosecutor's office have shown some effort and energy in terms of trying to secure these witnesses.
>
> And in fact on Thursday Sergeant Whitley was very appreciative of the fact that there was a Bench Warrant for the arrest of these particular witnesses so that they could in fact be secured. But we'll deal with that a little bit later on.[2]

Neither defendant requested a due diligence hearing, or raised the matter again.[3] Although defendant Palmer preserved a claim that the prosecution was not sufficiently diligent in

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[1] Defendants were also tried on counts of assault with intent to commit murder with respect to King, Lockridge, and Roach, who were in Bartlett's vehicle; however, the trial court dismissed these counts by directed verdict, on the basis that Bartlett was the only intended victim of the shooting.

[2] The jury was waiting, and the trial court delayed further discussion on the matter, as well as defendant Palmer's motion for a directed verdict, until the lunch break. During the break, defendant Palmer moved for a directed verdict, but did not raise this issue.

[3] The defendants did not request the "missing witness" instruction, and expressed satisfaction with the jury instructions.

its efforts to produce the witnesses, he failed to request a due diligence hearing. Therefore, we review this claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

If the prosecution endorses a witness, it is obliged to exercise due diligence to produce the witness at trial. MCL 767.40a; *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). The failure to produce an endorsed witness may be excused if the prosecutor can show that the witness could not be produced despite the exercise of due diligence. *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). This Court reviews a trial court's determination that due diligence was established for an abuse of discretion, *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998), and the findings of fact that underlie its due diligence decision for clear error, *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

Defendant Palmer has not demonstrated plain error affecting his substantial rights. He has identified no authority for his position that the trial court was required to sua sponte conduct a due diligence hearing. As the appellant, defendant is required to do more than merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. See *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). Consequently, defendant has not shown that it was plain error for the trial court not to conduct a hearing.

Further, defendant Palmer has not demonstrated that there was insufficient evidence of the prosecution's efforts to produce the witnesses to preclude a finding of due diligence. As noted above, the trial court indicated that it was aware of the prosecution's efforts to locate the witnesses and, contrary to defendant Palmer's suggestion, it is not clear from the record that those efforts were not reasonable. Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of the witness for trial. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). The focus is whether diligent, good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it. *Bean*, *supra*. Additionally, after entertaining argument on the issue, the trial court allowed defendants the opportunity to revisit the matter with additional information.

Moreover, even if there was plain error, defendant Palmer has not shown prejudice. Defendant Palmer has not presented affidavits of the witnesses' proposed testimony that would be helpful to him, or made any offer of proof such as police statements containing the witnesses' interviews. Simply put, there is no indication to support defendant Palmer's claim that the witnesses may have seen something that would have contradicted the identifications provided by Bartlett and Roach. In fact, with regard to King, the record disproves defendant Palmer's claim. Bartlett testified that King was asleep, and the investigating police officer who interviewed King after the incident testified that she could not provide any information because she was asleep. Consequently, this issue does not warrant reversal.

B. Jury Instructions

Defendant Palmer also argues that the trial court erred in failing to instruct the jury on assault with intent to do great bodily harm less than murder as a necessarily included lesser offense of assault with intent to commit murder. We disagree.

Claims of instructional error are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). MCL 768.32 only permits instruction on necessarily included lesser offenses, not cognate lesser offenses.[4] *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). "[S]uch an instruction is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and it is supported by a rational view of the evidence." *Id*.

Assault with intent to do great bodily harm less than murder is a necessarily included lesser offense of assault with intent to commit murder. *People v Brown*, 267 Mich App 141, 150; 703 NW2d 230 (2005). "[T]he lack of an actual intent to kill is the only element that differentiates assault with intent to do great bodily harm from assault with intent to commit murder." *Id.* at 151.

A rational view of the evidence did not support anything less than "an actual intent to kill." Both Bartlett and Roach identified defendant Palmer as the shooter. Defendant Palmer was in the passenger seat of a van that pulled directly alongside the driver's side of Bartlett's car. As the trial court noted, defendant Palmer used a gun to shoot at Bartlett from a couple feet away by extending his arm out of the window. He fired approximately six gunshots directly into Bartlett's car. Bartlett was shot four times in the head, and once in the shoulder. Bartlett suffered severe injuries. Considering the weapon used, and the circumstances, a rational view of the evidence does not support a finding of any intent other than an intent to kill.

Moreover, as the trial court also noted, intent was not a disputed issue. Rather, defendant Palmer's contention was that he was not the person who committed the offense. We find no error in the trial court's refusal to provide the requested instruction.

III. Defendant Palmer's Supplemental Brief

A. Ineffective Assistance of Counsel

In a supplemental brief filed in propria persona, defendant Palmer first argues that he was denied the effective assistance of counsel at trial. Because defendant Palmer failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the

[4] "A necessarily included offense is one that must be committed as part of the greater offense; it would be 'impossible to commit the greater offense without first having committed the lesser.'" *People v Alter*, 255 Mich App 194, 199; 659 NW2d 667 (2003) (citation omitted).

representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

1. Admission of Guilt

Defendant Palmer contends that defense counsel was ineffective for admitting his guilt by stipulating that he had a prior conviction. We disagree.

Defendant Palmer was charged with felon in possession of a firearm. An element of felon in possession of a firearm is the defendant's status as a convicted felon. MCL 750.224f; *People v Tice*, 220 Mich App 47, 53; 558 NW2d 245 (1996). Defense counsel stipulated that defendant was convicted of a specified felony, and that his eligibility to use or possess a firearm had not been restored.[5]

A defense attorney may believe it tactically wise to stipulate to a particular element of a charge or to issues of proof, but may not stipulate to facts that are the "functional equivalent" of a guilty plea. *People v Fisher*, 119 Mich App 445, 447; 326 NW2d 537 (1982). Although a felony conviction is a required element of establishing a defendant's guilt of a charge of felon in possession, defense counsel may have reasonably strategized that stipulating that defendant Palmer has been convicted of a specified felony would minimize any potential prejudice to defendant Palmer. See *People v Green*, 228 Mich App 684, 691; 580 NW2d 244 (1998) (a defendant may stipulate to a prior conviction that is a necessary element of a charged crime in order to avoid the prejudice associated with the prosecution's proof of that element). Furthermore, the element stipulated to could easily have been proven by official documents. Because defense counsel left the prosecution to its proofs on the element of possession, the stipulation was not a "functional equivalent" of a guilty plea. Consequently, defense counsel was not ineffective in this regard.

2. Failure to Call Two Alibi Witnesses

We reject defendant Palmer's claim that defense counsel was ineffective for failing to call defendant's sister Nicole Palmer, and her boyfriend Javon[6] Clay, as alibi witnesses. The failure to call a supporting witness does not inherently amount to ineffective assistance of counsel, and there is no "unconditional obligation to call or interview every possible witness suggested by a defendant." *People v Beard*, 459 Mich 918, 919; 589 NW2d 774 (1998). "Ineffective assistance of counsel can take the form of a failure to call witnesses only if the failure deprives the defendant of a substantial defense." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), mod on other grounds 453 Mich 902 (1996). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.*

[5] Contrary to defendant Palmer's statement in his supplemental brief, defense counsel did not stipulate that defendant Palmer "has been previously convicted of possession of a firearm."

[6] The record is unclear regarding the spelling of Clay's first name.

In an affidavit, defendant Palmer stated that Clay called him about 7:30 p.m., and asked if he needed a ride. "About 15 to 20 minutes later," Clay told defendant Palmer that he was nearby, and subsequently picked up defendant Palmer from a gas station on Euclid and Woodward "in the range of being 8 p.m." In his affidavit, Clay averred that defendant Palmer told him that he needed a ride home a little after 7:00 p.m. He then picked up defendant Palmer from a gas station after 7:30 p.m., and drove home where he, Nicole, and defendant Palmer remained throughout the night. Nicole averred in her affidavit that defendant Palmer lived with her, and that he was at her home between 8:00 and 9:00 p.m., and stayed there until the following morning.

Although the proposed alibi evidence would have placed defendant Palmer in a different locale at the time of the shooting, it conflicts with his defense of misidentification argued at trial. The defense argued that Bartlett had an antagonistic exchange with defendant Palmer earlier that day at a party store, and therefore Bartlett and Roach blamed defendant Palmer for the subsequent shooting, although they could not have gotten a good view of the shooter. The trial testimony placed all of the parties, including defendant Palmer, at a party store on Oakland and Clay at approximately 8:30 p.m. But the proposed alibi evidence placed defendant Palmer at a gas station in need of a ride at about 7:30 p.m., on the way home in Clay's car after 7:30 p.m., and at home between 8:00 and 9:00 p.m. Given the eyewitness testimony, the proffered defense, the relationship of defendant Palmer to the alibi witnesses, and the temporal discrepancy created by the proposed alibi evidence, we cannot conclude that defense counsel's failure to call the potential witnesses deprived defendant Palmer of a substantial defense. Consequently, defendant has not demonstrated that defense counsel was ineffective for failing to call the two witnesses.

3. Failure to Challenge the Absence of Two Endorsed Witnesses

We also reject defendant Palmer's claim that defense counsel was ineffective for failing "to require that the prosecutor show due diligence in producing endorsed res gestae witnesses," and for failing to request that the jury be instructed in accordance with the "missing witness" instruction. Contrary to defendant Palmer's argument, defense counsel did challenge whether the prosecution exercised due diligence to produce the two endorsed witnesses.

Further, the trial court should instruct the jury that it may infer that a missing witness's testimony would have been unfavorable to the prosecution's case if a trial court finds that the prosecution *did not* exercise due diligence. *Eccles*, *supra*. Here, the trial court concluded that the prosecution exercised due diligence. Because there was no basis to request the instruction, defendant Palmer cannot establish a claim of ineffective assistance of counsel. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to make a futile objection).

4. Failure to Move for Separate Trials

Defendant Palmer, who was tried jointly with codefendant Jackson, further argues that defense counsel was ineffective for failing to move for severance. We disagree.

In general, a defendant does not have a right to a separate trial. *People v Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976). Indeed, a strong policy favors joint trials in the interest of justice, judicial economy, and administration. *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d

490 (1992). Severance is mandated under MCR 6.121(C) only when a defendant demonstrates that his substantial rights will be prejudiced and that severance is necessary. *People v Hana*, 447 Mich 325, 345; 524 NW2d 682 (1994). To make this showing, a defendant must provide the court with a supporting affidavit, or make an offer of proof, showing that the circumstances "clearly, affirmatively, and fully demonstrate[] that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Id.* at 346. Mere inconsistency of defenses is not enough to require severance; the defenses must be mutually exclusive or irreconcilable. *Id*. at 349. "Incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice. The 'tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.'" *Id.* (citation omitted). "[S]everance should be granted 'only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" *Id*. at 359-360 (citation omitted).

Defendant Palmer's and codefendant Jackson's joint trial involved several witnesses and substantially identical evidence. To hold separate trials in these substantially identical cases would have been unnecessarily duplicative and excessive. The interests of justice, judicial economy, and orderly administration clearly favored a joint trial. Defendant Palmer has not provided any concrete facts or reasons to justify separate trials, and has not persuasively demonstrated that his substantial rights were prejudiced by a joint trial. The record does not show "significant indication" that the requisite prejudice in fact occurred at trial. *Id*. at 346-347. Further, the jury was not required to believe one defendant at the expense of the other and, in fact, it did not. Defendant Palmer and codefendant Jackson were each convicted of the charged offenses.

Moreover, the risk of prejudice from a joint trial may be allayed by a proper cautionary instruction. *Id.* at 351, 356. The trial court instructed the jury that each case was to be considered and decided separately and on the evidence as it applied to each defendant. Because defendant Palmer has failed to show that he was entitled to severance, he cannot establish that he was prejudiced by defense counsel's failure to move for severance. See *Snider*, *supra*.

B. MRE 404(b)

We reject defendant Palmer's claim that his convictions must be reversed because the trial court allowed the prosecutor to introduce evidence that he had a prior conviction that made him ineligible to possess a firearm, without complying with the requirements of MRE 404(b). Because defendant Palmer failed to timely object, we review this claim for plain error affecting substantial rights. *Carines*, *supra*.

Defendant Palmer's argument is misplaced. MRE 404(b)(1) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). MRE 404(b) is not implicated if evidence of "other acts" is logically relevant and does not involve the intermediate inference of character. *People v VanderVliet*, 444 Mich 52, 55, 64; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). It is well established that each element of an offense is in issue when a defendant denies guilt, and that the prosecution must prove every element beyond a reasonable doubt. *Id*. at 78-79. Because defendant Palmer's prior conviction was relevant to the charge of felon in possession, we reject his claim of error.

C. Mistrial

Defendant Palmer further argues that the trial court should have sua sponte ordered a mistrial after the opinions of prospective jurors regarding the presumption of innocence tainted the entire jury pool. Because defendant Palmer failed to raise this issue below, we review this claim for plain error affecting substantial rights. *Carines*, *supra*.

Defendant Palmer claims that the following exchange "tainted the entire panel":

> [*Defense counsel*]: Now occasionally there are people that think that because somebody has been charged with a crime, the police have made the accusation, the prosecutor's office has filed charges, they must be guilty.
>
> Does anybody here have that feeling he has been arrested, he must've done something?
>
> [*Prospective juror*]: I kind of do. I don't have very much experience with the law, but usually I trust the police.
>
> [*Defense counsel*]: So you're, the way you view things is simply that if somebody has been arrested there is something going on?
>
> [*Prospective juror*]: Probably.
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> * * *
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> [*The trial court*]: [Prospective juror], did you understand what I explained about the presumption of innocence?
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> [*Prospective juror*]: Yes.
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> [*The trial court*]: You understand that anybody can be arrested. Do you understand my deputy could arrest you right now for bank robbery?
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> [*Prospective juror*]: I hope not.
>
> [*The trial court*]: Would you want people to assume because my deputy unfortunately thinks well, they must be getting the right one. They must have done something?
>
> [*Prospective juror*]: No I understand that he's presumed innocent.
>
> [*The trial court*]: I guess the question is[,] is that something you are willing to do in your role as a juror?
>
> [*Prospective juror*]: Yes, I am willing to.
>
> [*The trial court*]: Right at this point until you are persuaded by the evidence from the prosecution, you have to assume that [the defendants] are innocent. Is that something you kind of feel that you would begrudgingly feel or - -

[*Prospective juror*]: No. No.

Following a motion by defense counsel, the juror was excused for cause. The court noted that it believed that the juror would be fair and impartial, but excused her because of a prepaid European trip.

Subsequently, the following exchange occurred with a different juror:

> [*Prospective juror*]: I was listening to the gentleman ask the one lady about being impartial to, being predisposed to think somebody that has been arrested, they have done something wrong. I have been fighting with that in my head, and I think unfortunately I believe that I may have that predisposition as well. [Tr I, p 86.]
>
> [*The trial court*]: Well - -
>
> [*Prospective juror*]: I understand the innocence, and I came in here believing that everybody is innocent until proven guilty. But I thought about it and the more I thought about it, I think I may have that predisposition as well.
>
> [*The trial court*]: Well, let me say this. I don't think that it is highly unusual for you to feel that way. I think what the law requires though is that you be willing to accept and apply the concepts that the defendants are presumed to be innocent.
>
> * * *
>
> If they don't prove the guilt of the defendants, then you have to find the defendants not guilty.
>
> Is that something you're willing to do?
>
> [*Prospective juror*]: Yes.

Defense counsel excused the prospective juror by peremptory challenge. Nonetheless, defendant Palmer now argues that he was denied his right to a fair and impartial jury because the excused jurors' comments tainted the entire jury.

A defendant has a right to a fair and impartial jury. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). To show the denial of a fair and impartial jury in this context, a defendant must show that the jury was exposed to extraneous influences and that the extraneous influences "created a real and substantial possibility that they could have affected the jury's verdict." *Id*. at 88-89. A reviewing court must closely examine the entire voir dire to determine if an impartial jury was impaneled. *People v Jendrzejewski*, 455 Mich 495, 517; 566 NW2d 530 (1997). Due process only demands that jurors act with a "lack of partiality, not an empty mind." *Id*. at 519.

We are not persuaded that the jury was exposed to extraneous influences that tainted it. Although the jury heard the prospective jurors' comments, it is unclear what, if any, negative

effect the comments could have had on defendant Palmer's case. The trial court immediately addressed the jurors' comments. The two jurors were excused. The impaneled jurors explicitly indicated that they could be fair and impartial. The trial court instructed the jury on the presumption of innocence, to consider only the evidence properly admitted in court and, before deliberations, reminded the jury that it took an oath to decide the case based only on the properly admitted evidence and the law as instructed by the court. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

To the extent that defendant Palmer contends that he is entitled to a new trial because defense counsel was ineffective for failing to request the removal of the entire jury pool, we find no error. Because defendant cannot demonstrate that the prospective jurors' comments tainted the jury, he cannot establish a claim of ineffective assistance of counsel. See *Snider, supra*.

D. Prosecutorial Misconduct

Defendant Palmer also argues that he was denied a fair trial because the prosecutor impermissibly shifted the burden of proof by requiring him to provide an explanation for missing witnesses. Although defendant Palmer refers to himself in this issue, the prosecutor was questioning codefendant Jackson. Consequently, this issue is without merit.[7]

IV. Docket No. 265377 (Defendant Jackson)

A. Mistrial

In his first issue on appeal, defendant Jackson argues that the trial court should have sua sponte declared a mistrial after two prospective jurors' opinions regarding the presumption of innocence tainted the entire jury pool. He further argues that because defense counsel failed to request the removal of the entire jury pool, he was denied the effective assistance of counsel. For the reasons discussed in part III(C) of this opinion, we find that defendant Jackson is likewise not entitled to a new trial on this basis.

B. Ineffective Assistance of Counsel

Defendant Jackson, who was tried jointly with codefendant Palmer, further argues that defense counsel was ineffective for failing to move for severance. For the reasons discussed in part III(A)(4) of this opinion discussing codefendant Palmer's appeal of this issue, we find that defendant Jackson also has failed to show that he was entitled to severance. Consequently, defendant Jackson cannot establish that he was prejudiced by defense counsel's failure to move for severance. *Snider, supra*.

Defendant Jackson also argues that defense counsel was ineffective for failing "to require that the prosecutor show due diligence in producing endorsed res gestae witnesses," and for failing to request that the jury be instructed in accordance with the "missing witness" instruction.

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[7] This issue is addressed as one of codefendant Jackson's issues in part IV(C).

However, defense counsel did challenge whether the prosecution exercised due diligence to produce the two endorsed witnesses. Further, because the trial court concluded that the prosecution exercised due diligence, there was no basis for defense counsel to request the instruction. *Eccles*, *supra*. Therefore, defendant cannot establish a claim of ineffective assistance of counsel on this basis. *Snider*, *supra*.

C. Prosecutorial Misconduct

Defendant Jackson also argues that he was denied a fair trial because the prosecutor impermissibly shifted the burden of proof. We disagree.

At trial, defendant Jackson testified that he was not involved in the shooting. He claimed that on the day of the incident, he left the house with defendant Palmer and "Darius" in Darius's minivan. He claimed that Darius owned the minivan, and was the only driver. Defendant Jackson did not have a car or a valid driver's license. Between 7:30 and 8:30 p.m., the group was at a store where defendant Jackson saw and spoke with Bartlett. After leaving the store, Darius dropped him off at his uncle's house at 8:30 or 8:45 p.m., and his barber came to the house at about 8:45 p.m.

During the prosecutor's cross-examination of defendant Jackson, the following exchange occurred in which defendant Jackson claims the prosecutor impermissibly shifted the burden of proof by requiring him to provide an explanation for missing witnesses:

Q. Who owns the minivan that you were in?

A. Should be Darius.

Q. It should be Darius?

A. He's the only person I saw drive it.

Q. So since you would - - I believe you testified that Darius was in the van with you and the other - - [codefendant Palmer]

Where is Darius today?

A. I don't know.

Q. He knows that you're on trial; is that correct?

A. He should.

Q. Who is Darius to you?

A. He's a friend.

Q. He's a friend of yours?

A. Yes.

Q. And he knows you're on trial, and he's not here today?

A. I guess so.

* * *

Q. What's the name of the person that came over to your house to cut your hair?

A. His name is Eric. I don't know his last name.

Q. And do you know where Eric is?

A. He stay [sic] on Euclid and Kingsley.

Q. Do you know where he is today? Do you have any idea?

A. He should be home.

Q. Do you know if Eric knows that you're on trial?

A. Yes, he know [sic]. I [sic] been trying to get him to court on my behalf.

Q. But he's not here today, is he?

A. No.

Because defendant Jackson failed to object to the prosecutor's conduct, we review this claim for plain error affecting substantial rights. *Carines*, *supra*. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Although a prosecutor may not imply that a defendant must prove something, *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991), here, viewed in context, the prosecutor's argument did not shift the burden of proof. The prosecutor's questions concerning whether defendant Jackson had been in contact with Darius and Eric, and concerning their absence from court to testify about defendant Jackson's whereabouts at the time of the offense, directly challenged the credibility of defendant Jackson's testimony on direct examination. "While the prosecution may not use a defendant's failure to present evidence as substantive evidence of guilt, the prosecution is entitled to contest fairly evidence presented by a defendant." *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). Additionally, although a defendant has no burden to produce any evidence, once he advances a theory, argument with regard to the inferences created does not shift the burden of proof. *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998).

Furthermore, to the extent the challenged remarks could be viewed as improper, the trial court instructed the jurors that defendant did not have to offer any evidence or prove his innocence, and that the prosecution was required to prove the elements of the crimes beyond a

reasonable doubt. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Consequently, this issue does not warrant reversal.

D. Late Witness

Defendant Jackson also argues that he was denied a fair trial when the trial court allowed the prosecutor to add a witness, Sergeant Robert Jackson, during trial. We disagree.

During trial, the prosecution moved to endorse Sergeant Robert Jackson. Codefendant Palmer's attorney objected to the late addition of the witness. The prosecutor explained that there was an oversight because there were two police witnesses with the same last name, and mistakenly only Investigator Michael Jackson was listed. She advised the court that she had previously provided Sergeant Jackson's police report to the defense, and that he would only testify concerning codefendant Palmer's arrest. Codefendant Palmer's attorney recalled receiving the police report, although defendant Jackson's counsel denied receiving it. The trial court allowed the addition of Sergeant Jackson, noting the confusion with the last name, that the witness was not a surprise, that the witness would only testify regarding the arrest of codefendant Palmer, and that there was "[c]ertainly no harm to [defendant] Jackson." Thereafter, Sergeant Jackson testified that he and his partner executed an arrest warrant for codefendant Palmer on March 9, 2005.

MCL 767.40a(4) provides that "[t]he prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." "The trial court's decision to permit the prosecutor to add or delete witnesses to be called at trial is reviewed for an abuse of discretion." *People v Callon*, 256 Mich App 312, 325-326; 662 NW2d 501 (2003). To establish that the trial court abused its discretion, a defendant must demonstrate that the court's ruling resulted in prejudice. *Id*. at 328; *People v Williams*, 188 Mich App 54, 59-60; 469 NW2d 4 (1991).

Here, the trial court properly exercised its discretion to allow the prosecutor to add Sergeant Jackson, given that the absence was an oversight caused by two witnesses having the same last name, and that Sergeant Jackson testified only regarding codefendant Palmer's arrest. "Mere negligence of the prosecutor is not the type of egregious case for which the extreme sanction of precluding relevant evidence is reserved." *Callon, supra* at 328. Furthermore, defendant Jackson does not indicate that he would have done anything differently had the witness been listed, and does not show how he was prejudiced. Consequently, we reject this claim of error.

Affirmed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Joel P. Hoekstra